TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. ~~485.~~ 243 46

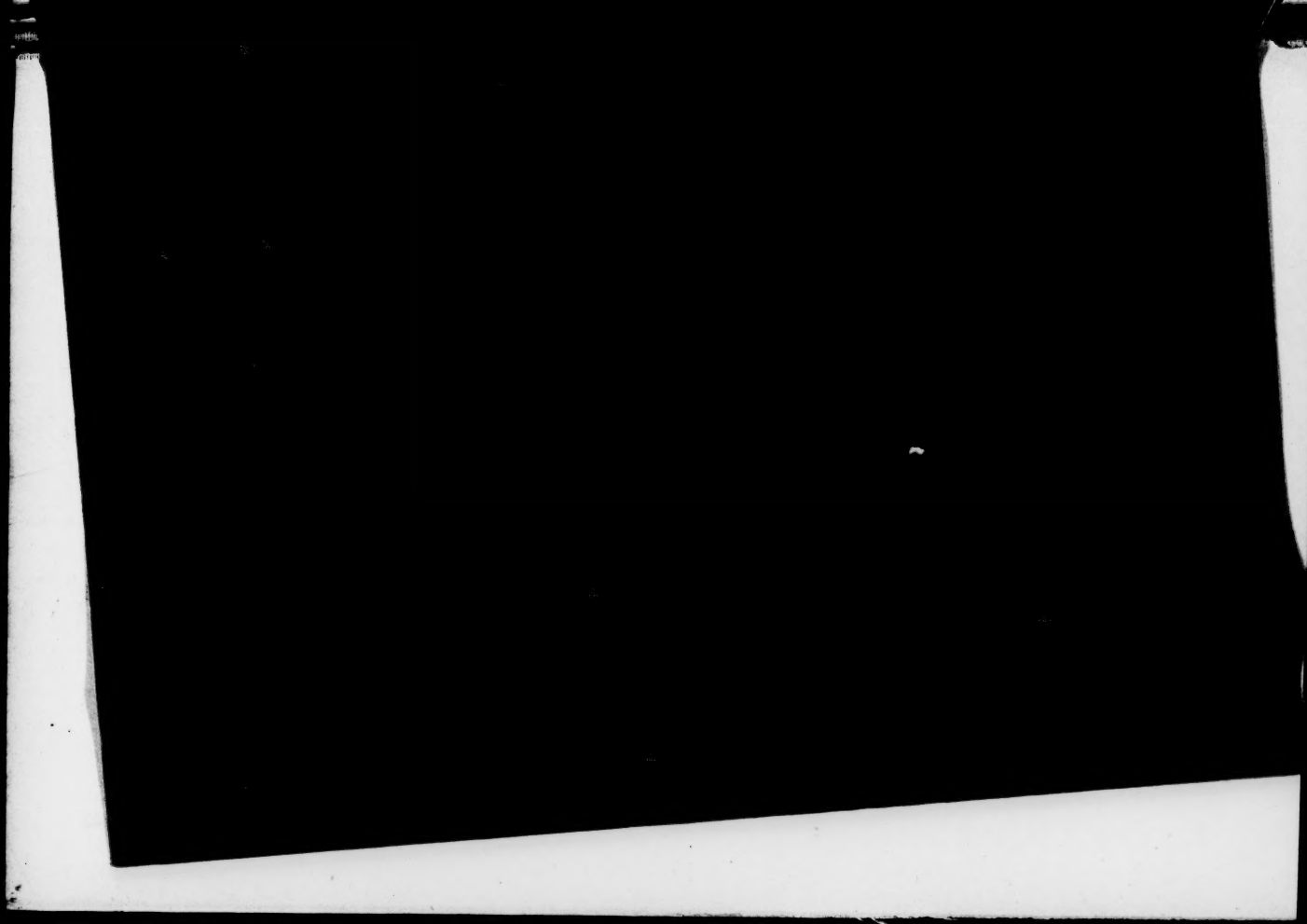
R. N. REED AND W. MORGAN WEAVER, AS R. N. REED & CO., PLAINTIFFS IN ERROR,

vs.

JAMES GARDNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED DECEMBER 6, 1871.



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a UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

At a stated term of the circuit court of the United States of America for the fifth circuit of the southern district of Georgia, begun and held according to law on Thursday after the first Monday of November, A. D. 1870, at the city of Savannah, in said southern district of Georgia—present and presiding, the Honorable John Erskine, United States judge for the district of Georgia, the Honorable William B. Woods, circuit judge, not being present, on the twenty-fifth day of said November, A. D. 1870, it being the thirteenth day of the said term, the following proceedings were had, to wit:

JAMES GARDNER *vs.* R. N. REED & CO. } Trespass on the case on promises.

Be it remembered that, heretefore, to wit, on the twenty-fourth day of March, A. D. 1868, came the plaintiff, by his attorneys, Messrs. Jackson, Lawton and Bassinger, and filed his declaration in the words and figures following, to wit:

1 *Declaration.*

UNITED STATES OF AMERICA,
Southern District of Georgia.

To the honorable the judges of the fifth circuit court of the United States for the southern district of Georgia.

The petition of James Gardner, who avers he is a citizen and resident of the State of New York, in the said United States of America, shews that he complains of Robert N. Reed and W. Morgan Weaver, partners under the firm-name and style of "R. N. Reed & Co.," who, your petitioner avers, are citizens of the State of Georgia, in the said United States of America, residing in the said southern district of Georgia, of a plea of trespass on the case on promises.

For that whereas heretofore, to wit, on the thirty-first day of May, eighteen hundred and sixty-seven, in the said southern district of Georgia, in consideration that one James Wilson, at the special instance and request of the said defendants, would deliver to the said defendants divers goods and chattels, to wit, one hundred bales of cotton, of
2 great value, to wit, of the value of ten thousand dollars, to be sold and disposed of by the said defendants for and on account of the said James Wilson for reasonable reward to the said defendants in that behalf, they, the said defendants, undertook, and then and there faithfully promised the said James Wilson to endeavor to sell and dispose of the said goods and chattels for the said James Wilson, and out of the nett proceeds thereof to pay to your petitioner the sum of four thousand dollars, which the said James Wilson then and there owed to your petitioner. And your petitioner avers that the said James Wilson did afterwards, to wit, on the day and year aforesaid, in the said southern district of Georgia, deliver the said goods and chattels to the said defendants for the purposes aforesaid; and that the said defendants did afterwards, to wit, on the day and year aforesaid, in the said southern district of Georgia, sell and dispose of the said goods and chattels for and on account of the said James Wilson for a large sum of money, to wit,

for the sum of ten thousand dollars, which was then and there
3 received by the said defendants for the purposes aforesaid, and that the nett proceeds of the said goods and chattels so sold and disposed of as aforesaid amounted to a large sum of money, to wit, the sum of nine thousand dollars, by means whereof the said defendants then and there became liable to pay to your petitioner the said sum of four thousand dollars first above mentioned when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, in the said southern district of Georgia, undertook, and then and there faithfully promised your petitioner to pay him the said sum of money when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the sixteenth day of December, eighteen hundred and sixty-seven, in the said southern district of Georgia, were indebted to your petitioner in the further sum of four thousand dollars for so much money before that time had and received by the said defendants for the use of your peti-
4 tioner, and at their special instance and request, and being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, in the said southern district of Georgia, undertook, and then and there faithfully promised your petitioner, to pay him the said sum of money when they, the said defendants, should be thereunto afterwards requested.

Yet the said defendants have disregarded their said promises, and have not paid to your petitioner the said several sums of money in this petition mentioned, nor any nor either of them, nor any part thereof, though often requested so to do; but so to do have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of your petitioner ten thousand dollars. And therefore, your petitioner brings suit, and prays process may issue, requiring the said Robert N. Reed and W. Morgan Weaver, to be and appear at the office of the clerk of the said court in Savannah, at rules to be had on the first Monday of April next, to answer your petitioner's complaint.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

5 *Copy account.*

Messrs. R. N. Reed & Co. to James Gardner, Dr.

1867. For cash received by you from proceeds of cotton sent you by James Wilson to be paid me..... $4,000 00

Process.

UNITED STATES OF AMERICA,
Southern District of Georgia:

In the fifth circuit court of the United States for the so. dist. of Georgia.

JAMES GARDNER
vs.
ROBERT N. REED AND W. MORGAN WEAVER. } Assumpsit.

The President of the United States to the marshal of the districts of Georgia, greeting:

The defendants, Robert N. Reed and W. Morgan Weaver, are hereby

required personally or by attorney, to be and appear at the clerk's office of said court in the city of Savannah, at rules to be had on the first Monday of April next, then and there to answer the plaintiff in an action of assumpsit, as in default thereof the said court will proceed as to justice shall appertain.

6 Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this twenty-fourth day of March in the year of our Lord one thousand eight hundred and sixty-eight.

[L. S. OF THE COURT] JA'S McPHERSON, *Clerk.*

Return of service.

On which was endorsed the following acknowledgment of service, to wit:

"Due and legal service acknowledged; copy and process waived. March 23, 1868."

LAW & LOVELL,
Def'd'ts' Att'ys.

And afterwards, to wit, on the 13th day of April, 1868, came the defendants, by their attorneys, Messrs. Law & Lovell, and filed their plea in the words and figures following, to wit:

Plea.

In the fifth circuit court of the United States, so. dist. of Ga. April term, 1868.

JAMES GARDNER }
vs. }
R. N. REED & Co. }

And now, at the said April term of said court, come the said defendants, by their attorney', Law and Lovell, and defend the wrong
7 and injury, when, &c., and say that they did not undertake and promise in manner and form, as the above plaintiff hath above thereof declared against them; and of this they put themselves upon the country, &c.

LAW & LOVELL,
Def'd'ts' Att'ys.

And afterwards, to wit, on the 30th day of April, A. D. 1868, came the plaintiff by his counsel, and filed his similiter to the defendants' plea as follows, to wit:

Similiter.

And the said plaintiff doth the like.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

And afterwards, to wit, on the 9th day of October, A. D. 1868, came the defendants, and filed their amended plea in the words and figures following, to wit:

Amended plea.

In the fifth circuit court of the United States, southern district of Georgia.

JAMES GARDNER
vs.
R. N. REED & CO.

And these defendants, for further plea in this behalf, by leave of the court here for this purpose first had and obtained, say that the said plaintiff ought not to have or maintain his said action thereof
8 against them, these defendants, because they say that they never had any dealings, contract, or agreement of any kind with, nor made any promise to, the said plaintiff touching or relating to the subject-matter of this suit; and this these defendants are ready to verify. Wherefore they pray judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against them.

And for a further plea in this behalf by like leave of the court here for this purpose first had and obtained, these defendants say that the said plaintiff ought not further to have or maintain his aforesaid action thereof against them, because they say that, on the thirty-first day of May, in the year eighteen hundred and sixty-seven, these defendants entered into an agreement with one James Wilson, by which it was agreed that, in consideration of advances of provisions, acceptances be made to him, the said James Wilson, by these defendants, to assist him in raising a crop upon the plantations owned by James Gardner, situated in the county of Lee, and State of Georgia, cultivated jointly by the said James Gardner and the said James Wilson, the said
9 James Wilson pledged himself to ship, as fast as it could be picked, out to these defendants at Savannah, for sale or commission, the entire crop of cotton raised in the year eighteen hundred and sixty-seven on the plantations aforesaid, and that a sufficient portion of the net proceeds of said cotton should be applied by these defendants to the payment of all amounts advanced by these defendants to him, the said James Wilson, after the first four thousand dollars, as per contract of the said James Gardner and the said James Wilson was provided for.

And these defendants say that the said James Wilson failed and refused to comply with his said agreement to send his entire crop, raised on the plantations aforesaid, to these defendants, but sent the larger portion, amounting to two-thirds of said crop, to other persons for sale, after having received advances from these defendants in cash, groceries, plantation supplies, &c., amounting to seven thousand three hundred and twenty-nine dollars and fifty cents, inclusive of interest, contrary to his said agreement, which, being a condition precedent to the
10 performance of the agreement by these defendants, they ought not to be bound to the performance of their agreement until the said James Wilson hath in all things performed and fulfilled his aforesaid part of the agreement; and this these defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them.

And for further plea in this behalf, these defendants, by like leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said plaintiff, before and at the

time of the commencement of this suit, to wit, on the twenty-second day of March, eighteen hundred and sixty-eight, at Savannah, in the southern district of Georgia aforesaid, was and still is indebted to these defendants in a large sum of money, to wit, the sum of seven thousand three hundred and twenty-nine dollars and fifty cents, exclusive of interest, for so much money advanced in cash and for groceries and
11 plantation supplies, advanced and furnished to the said plaintiff and one James Wilson, to assist them in raising a crop upon the plantations, in the second amended plea mentioned, cultivated jointly by the said plaintiff and one James Wilson, and for the said plaintiff, and at his request: which said sum of money so due and owing to these defendants as aforesaid, exceeds the damages sustained by the said plaintiff by reason of the non-performance by these defendants of the said supposed promise and undertaking in the said declaration mentioned; and this these defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them.

LAW AND LOVELL,
Def'd'ts' Att'ys.

SAVANNAH, *Oct.* 9, 1868.

Messrs. JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

GENTLEMEN: You will please take notice that the defendants in the above-entitled cause will, upon the trial thereof, rely in their defence upon the plea of set-off, filed in the above cause according to their bill of particulars of record.

12 Very truly, yours.

LAW & LOVELL,
Def'd'ts' Att'ys.

Mr. James Wilson to R. N. Reed & Co.

1867.			
Aug. 13.	To accepting draft, $377.35, 2½%.....		9 43
Oct. 18.	" rev. tax, 25 b. c.....		291 94
	" freight, " "		138 51
	" drayage, " "		5 00
	" storage, " "		12 50
	" insurance, " "		12 50
	" U. S. tax, " " 1% of 1%.....		1 82
	" city " " " " " "		1 82
	" mending, " "		75
	" commission, " "		45 30
22.	" dividing tax receipt.....		25
23.	" drf't W. H. Stark & Co., Sept. 3d.....		380 40
	" " " " " July 15.....		327 70
	" " " " " Aug. 14.....		67 88
	" accepting drafts.....		11 21
24.	" cash, May 31.....		2,257 81
	" " Aug. 22		214 33
	" d'f't W. H. Stark & Co., May 31.....		1,502 02
	" accepting draft.....		30 05
26.	" 1 h'h'd sides, 952, 138, 814, 19½.....		158 73
	" drayage.....		50

Nov.	1.	" tax on 26 b. c		268 57
		" freight " "		128 31
		" drayage " "		5 20
		" storage " "		13 00
13				
Nov.	1.	To insurance		13 00
		" U. S. tax, $\frac{1}{10}$ of 1%		1 63
		" city "		1 63
		" mending		50
		" commissions		40 70
	7.	" 1 h'h'd sides $\frac{977}{1312}$, 845, 19c		160 55
		" drayage		50
	8.	" advancing 1,950.30, $2\frac{1}{2}$ %		48 75
	18.	" am't p'd d'f't' Hines & Hobbs		377 75
		" advancing $377.75		9 44
Dec.	16.	" tax on 28 b. c		306 68
		" freight " "		145 50
		" drayage " "		5 60
		" city tax " " $\frac{1}{10}$ of %		1 75
		" Gov't " " " " "		1 75
		" storage " "		14 00
		" insurance " "		14 00
		" commission " "		42 61
	24.	" freight, 13 b. c		70 96
		" rev. tax, " "		149 55
		" drayage " "		2 60
		" city tax " " $\frac{1}{10}$ of 1%		75
		" Gov't " " " " " "		75
		" storage " "		6 50
		" insurance " "		6 50
		" mending " "		1 50
		" commission " "		18 62
				$7,329 60

On which was the following endorsement, to wit: " We consent to the filing of this plea, and waive notice."

14 JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

And afterwards, to wit, on the 5th day of April, A. D. 1869, came the said plaintiff, by his counsel, and filed his replication to defendant's amended plea, in the words and figures following, to wit:

Replication.

Fifth circuit court United States, southern district of Georgia.

JAMES GARDNER }
vs.
R. N. REED & CO. }

And the said plaintiff, as to the first and second of the amended pleas of the said defendants, says that he ought not to be barred, by reason of anything in those pleas alleged, from having and maintaining his aforesaid action thereof against the said defendants, because he says

that the said defendants, at the said time, when, &c., of their own wrong, and without the causes by them in their said first and second amended pleas alleged, broke their said promises in manner and form, as the said plaintiff hath above in his said declaration complained against them; and this he prays may be inquired of the country, &c.

15 And as to the third of the amended pleas of the said defendants the said plaintiff says that he ought not to be barred, by reason of anything in that plea alleged, from having and maintaining his aforesaid action thereof against them, because he says that he was not, nor is, indebted to the said defendants in manner and form as the said defendants have above in their said third amended plea alleged; and this the said plaintiff prays may be inquired of by the country, &c.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

And afterwards, to wit, on the 8th day of January, A. D. 1870, came the plaintiff, by his counsel, in open court, and moved the court for leave to withdraw the plaintiff's replication to the defendants amended plea, whereupon the following order was granted, to wit:

Leave to withdraw replication.

Fifth circuit court, southern district of Georgia.

JAMES GARDNER
vs.
R. N. REED & Co.

It is ordered that the plaintiff have leave to withdraw his replication, and demur, or reply anew, or both.

Jan'ry 8, 1870.

16 On motion of Jackson, Lawton & Bassinger, pl'ff's att'ys.

JOHN ERSKINE,
U. S. Judge.

And afterwards, to wit, on the 8th day of January, A. D. 1870, came the plaintiff, by his counsel, and filed his demurrer and replication, in words and figures as follows, to wit:

Demurrer and replication.

Fifth circuit court U. States, southern district of Georgia.

JAMES GARDNER
vs.
R. H. REED & Co.

And the said plaintiff, as to the pleas of the defendants by them first above pleaded in their amended plea, says that the same is not sufficient in law.

And the said plaintiff states the following causes of demurrer to the said plea, that is to say—

1st. That the said plea amounts to the general issue.

2d. That the plea in other respects is uncertain, informal, and insufficient, &c; and this the plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the said plea, the said plaintiff prays judgment and his damages to be adjudged to him, &c. And the said plaint-
17 iff, as to the plea of the said defendants by them secondly above pleaded in their said amended plea, says that he ought not, by reason of anything in that plea alleged, to be barred from having and maintaining his aforesaid action thereof against the said defendants, because he says that such part of the said crop of cotton as was sent by the said James Wilson to other factors than the said defendants, was so sent with the subsequent ratification and previous assent of the said defendants; and this the said plaintiff is ready to verify. Wherefore he prays judgment, and his damages by him sustained on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

And the said plaintiff, as to the plea of the said defendants by them thirdly above pleaded in their said amended plea, says that he ought not to be barred, by reason of anything in that plea alleged, from having and maintaining his aforesaid action thereof against them, because he says that he was not, nor is, indebted to the said defendants in manner and form as the said defendants have above in their third
18 amended plea alleged; and this the said plaintiff prays may be inquired of by the country, &c.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

And afterwards, to wit, on the twenty-fifth day of November, A. D. 1870, the counsel for plaintiff and the counsel for defendants came in open court and consented in the words & figures as follows, to wit:

Consent withdrawal of 1st amended plea and demurrer thereto.

Fifth circuit court of the United States, southern dis't of Georgia.

JAMES GARDNER
vs.
R. N. REED & Co.

It is hereby mutually agreed between the counsel for plaintiff and defendants that the first amended plea and the demurrer thereto be considered as withdrawn.

November 25, 1870.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.
LAW, LOVELL & FALLIGANT,
Def'd'ts' Att'ys.

19 TESTIMONY.

And the said plaintiff, by his counsel, and with consent of the defendant's counsel, endorsed on the interrogatories to be propounded to James Wilson, a witness for the plaintiff, said consent being in words as follows, to wit:

"Commission waived. Let testimony be taken by any one of the following persons, W. A. Hawkins, esq., C. T. Goode, esq., or Scarborough, esq.

"LAW & LOVELL, *Def'd'ts' Att'ys.*
"JACKSON, LAWTON & BASSINGER,
"*Pl'ff's Att'ys.*"

had the following testimony taken and filed in the clerk's office on the 4th day of November, A. D. 1869, to wit:

Testimony of James Wilson on the part of the plaintiff.

In the fifth circuit court United States, southern district of Georgia.

JAMES GARDNER
vs.
R. N. REED & Co.

Interrogatories to be propounded to James Wilson, a material witness for the plaintiff in the above entitled case, who resides in the State of Georgia, but more than miles from the city of Savannah.

20 1st. Do you know the plaintiff and defendants or either of them?

2nd. Were you or not engaged in planting, in the year 1867, with the plaintiff? If yea, then on what terms, and with what other persons, if any, and what was the result of the year's operations. Was or was not Henry J. Boynton engaged with the plaintiff and yourself in planting during the year 1867?

3rd. If you say that you were engaged in planting, in the year 1867, with the plaintiff, then state whether you had a written contract with the plaintiff. What were the terms of said contract; was it verbal or in writing? If in writing, and you have the original or a true copy of said contract, attach such original or true copy to your answers, as part of same; and if you have neither the original or true copy, then please account for the loss of the original or such true copy as you may have had in your possession or under your control.

4th. Was it or was it not a part of your contract with plaintiff that the sum of four thousand dollars was to be paid to him, for rent of the plantation belonging to him and occupied and cultivated under
21 that contract, out of the proceeds of the crop, before any other payments out of or any appropriation of the same for any other purpose whatever?

5th. Did you or did you not, in pursuance of the terms of said contract, make any arrangements with the defendants, R. N. Reed & Co., as factors, to sell the produce of said plantation? If yea, please state what were the terms of said arrangement with said defendants, R. N. Reed & Co., and if made in writing, attach a copy of the same to your answers as part of the same, and if said writing cannot be produced, account for the loss and absence of the same.

6th. Did or did not the said R. N. Reed & Co. distinctly agree to pay the first proceeds of sales of cotton from said plantation to the plaintiff, James Gardner, for the rent to be due him; and did you or did you not furnish said R. N. Reed & Co. with a copy of the contract or agreement between the said plaintiff, James Gardner, & the witness, James Wilson, to be retained by them, the said R. N. Reed & Co., as part and parcel of the agreement then made with them as factors to sell the cotton produced and to be produced on said plantation?

22 7th. Did you or not send the cotton produced on said plantation, in the year 1867, to R. N. Reed & Co., as factors, to be by them sold and disposed of under the terms of both said agreements; and, if so, how much cotton, and what were the proceeds of sale?

8th. Have you had any conversation or correspondence with R. N.

Reed & Co., or either of the firm, since the sale of said cotton, in reference to the claim of the said plaintiff, James Gardner, to be paid the said proceeds of sale of cotton to the extent of four thousand dollars, before any other claim whatever? If yea, state whether they did not acknowledge that they had made an agreement to do so. If you had any letter or telegram from them on the subject, attach the same to your answers, or if not now in your possession, state what has become of them.

9th. Do you or do you not know anything of a certain draft drawn by the plaintiff on the defendants for the sum of two thousand dollars, on account of said proceeds of sales of cotton, and sent for collection to the Central Railroad Bank, Savannah? If yea, state whether said draft has been paid, and if not paid, have defendants since promised to
23 pay it. If such promise was made by letter or telegram, attach the same to your answers, or state what has become of them or it.

10th. Was any portion of said cotton grown on said plantation in the year 1867, sent to Hardeman & Sparks, Macon, or to any other factors for sale? If yea, why was such cotton so sent; and was or was not such disposition of a portion of said crop of cotton made with the consent and approbation of the said defendants, R. N. Reed & Co.? Did you or not have any distinct understanding with the said R. N. Reed & Co., in relation to so much of said cotton as was sent to Hardeman & Sparks, or to any factors other than R. N. Reed & Company.

11th. State all you know which will benefit the plaintiff, or show the obligation of the defendants to pay him the sum of four thousand dollars, as claimed for rent of plantation, as fully in every respect as if you were specially interrogated thereto.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

Objections.

If the agreements inquired of in the 3d, 4th, 5th, 6th, & 9th interrogatories were in writing, the defendants objects to any testimony
24 of the witness in reply to these interrogatories, except such as goes to prove the loss of said original agreements, & in that event to establish copies thereof.

LAW & LOVELL,
Def'd'ts' Att'ys.

Cross-interrogatories.

1st. Were not you, James Gardner, the plaintiff, and Henry J. Boynton, partners in planting plaintiff's plantation in Lee County, Georgia, in 1867; and did you not buy out Boynton's interest early in that year and release Boynton from all demands which might be made against the firm of Gardner & Wilson? Was not this planting business carried on by you & the plaintiff under the firm-name of Gardner and Wilson in 1867?

2d. Were not the advances made by R. N. Reed & Co. to you, in 1867, used and consumed by you in raising and cultivating the crop of cotton of that year on the plantations of the plaintiff in Lee County, Georgia? If yea, to whom did said crop belong and who received the benefit of it and its proceeds after it was raised? Annex to your answer a full statement of the amount of the crops made by you in 1867 on said plantations, on joint account with the plaintiff, the amount

realized from the sale of the same, or the value of the same, if, not sold, & how and in what proportion was said crop divided between you and the plaintiff, & how much did each of you realize from the same?

3rd. How much of the said crop of 1867 of cotton did you turn over to the plaintiff?

4th. Did you not meet R. N. Reed, one of the defendants, on the cars at Wooten station, on the Southwestern Railroad, in Georgia, and while travelling with him from that station to Albany, did you not tell him you was glad he did not pay Gardner's draft; and did you not, at that time, tell R. N. Reed to telegraph immediately on his arrival in Albany to his, R. N. Reed's, house, in Savannah, not to pay Gardner's draft under any circumstances; and did you not, in conversation with said R. N. Reed at the same time, tell said Reed that you would have shipped all the cotton made on Gardner's plantations to R. N. Reed & Co., as had been agreed, had not Gardner interfered to prevent you' so doing?

5th. Did you ever ask for or obtain the consent of the defendants to ship any of the cotton raised on Gardner's plantations, in 1867,
26 to Hardeman and Sparks, of Macon, Georgia, or to any other factors; and did you not ship some of said cottons, of the crop of 1867, to said Hardeman & Sparks? If yea, when and how many bales? Was not a portion of said crop of 1867, levied on by the defendants, through Hines and Hobbs, their attorneys, to prevent you' shipping it to other parties? If yea, how much and when; and did not said defendannts have said cottons attached in Macon, Georgia? If yea, when?

6th. Was there any contract or agreement of any kind in writing or verbal in relation to this cotton of 1867, between Gardner and Wilson and R. N. Reed & Co.? If yea, set it out in your answer.

7th. State all you know which will benefit the defendants, and which goes to show that it was the fault of the plaintiff, Gardner, that the crop of 1867, alluded to, was not shipped by you to the defendants as agreed on, & to whom it was shipped and when.

LAW & LOVELL,
Def'd'ts' Att'ys.

27 *Deposition of James Wilson to the above interrogatories.*

In the fifth circuit court of the United States, southern dist. of Georgia.

JAMES GARDNER
vs.
R. N. REED & CO.

Examination and deposition of witnesses produced, sworn and examined by the undersigned commissioners, by virtue of the annexed consent of counsel and waiver of commission, taken and reduced to writing at Americus, Georgia, on this 1st November, 1869.

JAMES WILSON, aged forty-two, being duly sworn, answers and deposes as follows, to wit:

To the first direct interrogatory the witness answering saith: I know the plaintiff and one of the defendants, R. N. Reed.

To the second direct interrogatory the witness, answering, saith: I was engaged in planting with the plaintiff, in the year 1867—the terms will be shown by an annexed copy of the contract hereto attached, as

part of my answer to this question, marked A—and with Thomas J. Boynton, during the early part of the year, until the 30th day of
28 March. The result of the year's operations was disastrous; nothing made, but heavy losses sustained. Henry J. Boynton was not engaged with plaintiff and witness in farming during that year, but Thomas J. Boynton, whom witness supposes is meant, was.

To the third direct interrogatory the witness, answering, saith: The contract was in writing, and a true copy is attached hereto as part of my answer to the second direct interrogatory.

To the fourth direct interrogatory the witness, answering, saith: In answer to this interrogatory I beg to refer to the contract, a true copy of which is attached as part of my answer to the second direct interrogatory, which will speak for itself as to terms, &c.

To the fifth direct interrogatory the witness, answering, saith: I did make an agreement, in pursuance of the terms of the contract, with R. N. Reed, & Co. as factors, to sell the cotton raised on said plantation. The terms of said arrangement *was* in writing, a true copy of which is hereto attached, marked "B," the defendants, R. N. Reed & Co. retaining the original agreement.

To the sixth direct interrogatory the witness, answering, saith:
29 They did, as shown by the agreement with them, attached as part of my answer to the fifth. Witness left with defendants, R. N. Reed & Co., a copy of the contract between pl'ff, James Gardner, and witness, to govern them (def'ts) in disposing of and disbursing the proceeds of the sale of cotton.

To the seventh direct interrogatory the witness, answering, saith: Under both said agreements witness shipped to defendants, R. N. Reed & Co., ninety-two bales of cotton, the proceeds of the sale of which witness is unable to state, except after the sale there was a balance of something over fourteen hundred dollars due defendants for advances.

To the eighth direct interrogatory the witness, answering, saith: Witness has had both correspondence and conversation with R. N. Reed, one of the defendants, since the sale of said cotton, in which conversation the said Reed acknowledged that defendants were to pay pl'ff, Gardner, four thousand dollars before any other claim whatever. Witness received one letter from defendants upon this subject, the original of which has been lost, but a true copy of the same was furnished to plaintiff, or to plaintiff's counsel, as well as witness recollects.

30 To the ninth direct interrogatory the witness, answering, saith: Witness first received a letter from defendants informing witness that plaintiff had drawn a draft for two thousand dollars on them, and they had declined to accept it. Witness, in reply to said letter, telegraphed defendants that they had best accept and pay said draft, or insisting upon their paying said draft. The exact wording of the telegram witness has forgotten. The defendants then telegraphed back to witness they would pay said draft, the original of which telegram witness has lost, but think' that he gave a true copy thereof to plaintiff or his counsel.

To the tenth direct interrogatory the witness, answering, saith: A portion of the cotton raised on said place, to wit, six bales of cotton, was sent to Hardeman & Sparks, without the knowledge of defendants, in order to get some ready money to pay hands for picking out cotton to send forward to defendants. A short time after this shipment, R. N. Reed, one of the defendants, came to Albany, and witness made known to him the fact of this shipment, and explained the cause, and defendant Reed expressed himself satisfied. Witness further informed him

that he might in future be forced to make other similar shipments
31 for similar purposes, and defendant Reed assented thereto. Defendants having refused to pay the draft referred to above, the balance of the crop, save sixteen bales, was shipped to Hardeman and Sparks, at Macon, and the sixteen bales of cotton was shipped to Woolfolk and Anderson, as well as witness recollects, by the plaintiff.

To the eleventh direct interrogatory the witness, answering, saith: That he knows nothing more.

Answers to cross-interrogatories.

To the first cross-interrogatory the witness, answering, saith: Yes, as is shown by the copy of the contract, and the endorsement thereon, except the name of Henry J. Boynton should have been written Thomas J. Boynton in the interrogatory.

To the second cross-interrogatory the witness, answering, saith: They were. The crop belonged to Gardner and Wilson. There was raised on said place about two hundred bales of cotton, and, witness supposes, about two thousand bushels of corn and twenty thousand pounds of fodder. The witness can't be positive as the above amounts raised as specified, as he does not now remember accurately. Nine thousand dollars will approximate the proceeds of the sale of cotton. The corn and the fodder was not sold, being left on the place to replace
32 supplies that were on the place the first of January, 1867. The proceeds of the cotton failed to realize an amount sufficient to defray the expenses of the place, and the corn and fodder, as stated, was left on the place to replace corn and fodder that was on the place in January, 1867. Plaintiff Gardner received about two hundred dollars from the proceeds of the sale of the sixteen bales of cotton shipped to Woolfolk and Anderson, referred to in answer to direct interrogatories. All the balance of the proceeds of the sale of the cotton crop went to defray the expenses of the making the crop, and was inadequate.

To the third cross-interrogatory the witness, answering, saith: None but the sixteen bales of cotton shipped to Woolfolk & Anderson, all of the proceeds of which, except the two hundred dollars referred to in the second cross-answer, went to the defraying the expenses of the place.

To the fourth cross-interrogatory the witness, answering, saith: After the correspondence between witness and defendants, R. N. Reed & Co., touching the acceptance or non-acceptance of the draft drawn by pl'ff, Gardner, on defendants, R. N. Reed & Co., witness went to see plaintiff, Gardner, to inform him that defendants had promised, by telegram,
33 to pay said draft, when he, witness, learned from plaintiff, Gardner, that he (Gardner) had placed a construction on the contract of Gardner and witness, that made witness the tenant of plaintiff, Gardner, and liable for the four thousand dollars rent; then it was that witness on his return—and feeling that Gardner was trying to take an undue advantage of him by such a construction of their contract—that he met R. N. Reed, one of the defendants, on the railroad, and expressed himself as set forth in the fourth cross-interrogatory. The refusal of defendants to pay the said draft was the cause of plaintiff, Gardner's, interfering to prevent any additional shipment being made to defendants.

To the fifth cross-interrogatory the witness, answering, saith: Witness has answered the part of this interrogatory in his answer to the tenth direct-interrogatory. Defendants, in the latter part of December, 1867, levied upon some seventy-five or eighty bales of cotton on the planta-

tion, and unginned, in the gin-house, through Hines and Hobbs, att'ys, in Albany, and as witness supposes, to prevent it being shipped to other parties; though, at that time, no steps were being taken by witness and plaintiff to ship said cotton to other parties. After said
34 levy was made, by arrangement with the sheriff, about thirty-three bales of said cotton was shipped to Hardeman & Sparks, at Macon, and in January, 1868, said thirty-three bales of cotton was attached by defendants in Macon.

To the sixth cross interrogatory the witness, answering, saith: The only agreement between the parties was with witness and defendants, as hereinbefore set forth in answer to direct interrogatories.

To the seventh cross-interrogatory the witness, answering, saith: Witness knows nothing more unless that it is that the remainder of the seventy-five or eighty bales of cotton, levied on by defendants, through their attorneys Hines & Hobbs, was ultimately shipped, by an arrangement and agreement with defendants' counsel, Hines & Hobbs, was shipped to Hardeman & Sparks at Macon.

JAMES WILSON.

Sworn to & subscribed before me this the 1st day of November, 1869.

C. T. GOODE.
FRANK E. BURKE.

35 EXHIBIT A.

GEORGIA, *Dougherty County:*

This contract, made and entered into this March 5, 1867, between James Gardner, of Richmond County, Georgia, the one part, and Thomas J. Boynton & James Wilson, of the State of Georgia & county of Dougherty, of the other part.

The said James Gardner agrees to cultivate his two plantations east of Muckalee Creek, in Lee County, in copartnership with said Thomas J. Boynton & James Wilson, for the current year, on the terms following:

The said James Gardner to receive four thousand dollars as rent for said places, to be paid out of proceeds of sale of crop.

Said Thomas J. Boynton & James Wilson to make all the advances in money, provisions, and supplies of all kinds necessary for the cultivation of said places, and to refund all the money paid and advanced thereto from January 1st, 1867, for the benefit of said places, estimated at or about fourteen hundred dollars; to make all advances to the overseers and laborers employed on the said places, and for freights, bagging, & rope, medicines, and all other articles, and for tools &
36 implements, mechanical labor, and all incidental expenses of all kinds. The money thus paid and advanced and refunded, to be a charge next in dignity and precedence to the charge of four thousand dollars for rent, & to be next paid out of proceeds of crops.

The crop of cotton to be shipped to a factor or factors, to be agreed upon, in Macon or Savannah, who is to hold the cotton crop subject to the terms of this agreement, & to meet the payments required in accordance with it. After the rent is provided for and the cash advances next provided for, the balance is to be held pledged to meet the obligations for other expenses. The surplus of the cotton, as well as all other crops grown on the places, which will be the profit, to be equally divided, one-half to the said James Gardner and the other half to the said Thomas J. Boynton and James Wilson, the factors to furnish each

of the parties acc't sales of the cotton as sold. The said James Gardner puts in 30 mules, bought by F. H. West of him, at five thousand dollars, payable Dec. 1st, 1867, as also, the wagons, carts, oxen, tools, &c., as common stock, at prices sold for to F. H. West, which amounts to seven hundred and twenty-four $\frac{95}{100}$, (724 95.) The said Thomas
37 J. Boynton and James Wilson are to put in mules sufficient for the proper cultivation of the place; say ten mules, & other property for the same purpose, as they may deem desirable, and all these to be put in at prices they cost, as common stock, and on a sale at the expiration of the year the proceeds to be divided pro rata. There is to be returned to the said James Gardner, at the end of the year, the following articles, which were estimated to be on the places January 1st, 1867.

Corn, 2,000 bushels.
Fodder, 12,000 lbs.
Pork, 6,890 lbs.
Bacon, 250 "
Lard, 90 "
Syrup, 1,322 gallons.
Field peas, 30 bushels.
And the seed out of 130 bales cotton, average 450 lbs.

(S'g'd) JAMES GARDNER.
THO'S J. BOYNTON.
JAMES WILSON.

Attest:
W'M T. WILSON.

(Written across the face:)

For value received, I do hereby transfer all my interest in the within contract to James Wilson, he to control and carry out the same as though my name, &', had never appeared therein.

March 30th, 1867.

T. J. BOYNTON.

"EXHIBIT B."

SAVANNAH, GA., *May* 31, 1867.

In consideration of advances of provisions, acceptances, &c.,
38 made to me by R. N. Reed & Co., of Savannah, to assist me in raising a crop, upon the plantation owned by James Gardner, of New York, and cultivated jointly by myself and James Gardner, the plantation situated in the county of Lee, and State of Georgia, I do hereby pledge myself to ship, as fast as it can be picked out, to said R. N. Reed & Co., at Savannah, for sale on commission, the entire crop of cotton raised this year on said plantation, and that a sufficient portion of the net proceeds of said cotton shall be applied by them, after the first four thousand dollars, as per contract of Gardner and Wilson is provided for, the estimated advances approximating two thousand dollars cash and two thousand dollars worth of provisions.

(S'g'd) JAMES WILSON.

And the plaintiff, by his counsel, and with consent of defendant's counsel, files the following, to wit:

Obligation of James Wilson to R. N. Reed & Co.

SAVANNAH, GA., *May* 31, 1867.

In consideration of advances of provisions, acceptances, &c., made to me by R. N. Reed & Co., of Savannah, to assist me in raising
39 a crop upon the plantations owned by James Gardner, of New York, and cultivated jointly by myself and said James Gardner, plantations situated in the county of Lee, and State of Georgia, I do hereby pledge myself to ship as fast as it can be picked out, to said R. N. Reed & Co., at Savannah, for sale on commission, the entire crop of cotton raised this year on said plantations, and that a sufficient portion of the net proceeds of said cotton shall be applied by them to the payment of all amounts advanced by them after the first four thousand dollars, as per contract of Gardner and Wilson is provided for, the estimated advances approximating two thousand dollars in cash and two thousand dollars' worth of provisions.

JAMES WILSON.

[U. S. stamp, canceled.]

And the plaintiff, by his counsel, and with consent of defendant's counsel, files the following copy of draft & protest, to wit:

Draft and protest.

UNITED STATES OF AMERICA,
City of Savannah:

On the 17th day of December, in the year of our Lord one thousand eight hundred and sixty-seven, at the request of the cashier of the
40 Central Railroad and Banking Company of Georgia, I, Richard W. Adams, a notary public in and for the county of Chatham, in the State of Georgia, by lawful authority duly admitted, commissioned, & sworn, residing in the city of Savannah, presented the original draft, a true copy whereof is hereon written, to Mr. Reid of the firm of R. N. Reed & Co., and demanded payment thereof from him; which he refused, saying, "I cannot pay it; have no funds." Of the non-payment thereof I mailed notice by the first mail for James Gardner, esq., Starksville, Georgia, drawer.

Whereupon I, the said notary, at the request aforesaid did protest, and by these presents do publicly and solemnly protest against the drawer of the said draft, and against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages, and interest already incurred or to be hereafter incurred for want of payment thereof.

Thus done and protested in the city of Savannah, aforesaid, this seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty-seven.

In testimonium veritatis.

R. W. ADAMS, *Not. Pub.*

41 *Copy draft.*

$2,000.] ALBANY, *Dec.* 16, 1867.

At sight pay to the order of Tho's M. Cunningham, cashier, two thousand dollars, value received, and charge to account of rent of plantations by James Wilson, as advised.

Yours resp'y,

JAMES GARDNER.

To R. N. REED & CO., *Sav'h, Ga.*

And, on the fifth day of November, 1868, the said defendants, by their counsel, sued out a commission to examine witnesses on the part of the defendants, for the examination of Ovid G. Sparks and Thomas J. Hardeman jr., in words & figures as follows, to wit:

Fifth circuit court of United States, southern district of Georgia.

JAMES GARDNER
vs.
R. N. REED & Co.

Interrogatories to be exhibited and propounded to Thomas Hardeman, jr., and Ovid G. Sparks, material witnesses, residing at Macon, in the county of Bibb, and State of Georgia, to be produced, sworn, & examined on the part of the defendants in the above case.

42 Int'g 1st. Do you know the parties, or *or* either, and which of them, in the above case?

Int'g 2d. Did you or either of you, during the latter part of the year 1867, or the early part of the year 1868, or spring of that year, receive any cotton consigned to you by James Wilson, of Lee County, Georgia, or by Gardner and Wilson, of said county?

Int'g 3rd. If yea, state who compose the firm of Gardner and Wilson; how many bales of cotton were so received; by whom shipped or consigned to you; from what county or place in Georgia was said cotton so shipped or consigned to you; whose cotton was it; on what and upon whose plantation, and in what county was said cotton raised and produced; was it cotton of the crop of the year 1867; for what purpose was the cotton consigned to you; in what capacity did you receive it—as factor, for sale, or how else; for whose use and benefit; and who received from you the said cotton or its proceeds?

Int'g 4th. If you know any other matter or thing of benefit to the defendants in the above case, state the same as fully and particularly as if you had been specially interrogated as to the same.

LAW & LOVELL,
Def'd'ts' Att'ys.

43 The plaintiff excepts to the above direct interrogatories as irrelevant. Subject to this exception, he propounds the following cross-interrogatories.

1st. If you state that any cotton was consigned to you by James Wilson or by Gardner and Wilson, in the latter part of 1867 or first of 1868, please state particularly with whom the arrangement was made by you to receive and sell this cotton—with Wilson or with Gardner—and when and where was such arrangement made; and how do you know where said cotton was raised or grown, and the product of what year.

2d. If you refer to such a firm as Gardner & Wilson, please state who composed said firm, when its existence begun and ended, and how you derived this information.

3rd. Did you have any interviews or correspondence with the plaintiff, James Gardner, which led to the receipt of that cotton by you, or to any information as to the existence of said firm of Gardner & Wilson? If yea, state when and where such conversation took place, and if there was any such correspondence, please annex the letters of the said
44 plaintiff, and copies of your letters to him.

4th. State all you know that will benefit the plaintiff in this cause, as fully as if you were specially interrogated thereto.

JACKSON, LAWTON & BASSINGER.

Deposition of Thomas Hardeman.

Fifth circuit court United States, southern district of Georgia.

JAMES GARDNER }
vs.
R. N. REED & Co. }

Examinations and depositions of witnesses produced, sworn, and examined by the undersigned commissioners, in virtue of the annexed commission, issuing out of the honorable fifth circuit court of the United States, southern district of Georgia, taken and reduced to writing, in Macon, Bibb Co., Ga., on this seventh day of November, 1868.

THOMAS HARDEMAN, aged over twenty-one, being duly sworn, answers and disposes as follows:

To the first direct interrogatory the witness, answering, saith: I know the parties.

45 To the second direct: Hardeman & Sparks, of which firm I am a member, received, in 1867, twenty bales of cotton from Gardner and Wilson, of Lee Co.; six, on the 10th of November, 1867; 6, on 23d November, 1867; one, 19th of Dec., and seven, the date of the receipt of which cannot be ascertained. H. & S. also received 48 b. c. in '68, from James Wilson of Lee County; 33, on the 14th February, 1868; 12, on 5th of March, '68, and 3 on 9th of May, '68.

To the third direct: James Gardner and James Wilson compose the firm of Gardner and Wilson. 68 b. c. were received as before stated which were shipped to us by James Wilson from Wooten station, Lee Co., Ga. I do not know who was the bona-fide owner of said cotton, or upon whose plantation or in what county it was made. I presume it was cotton of the crop of '67. It was consigned to H. & Sparks, as factors, for storage & sale, or the use and benefit of consignee, and James Wilson received the proceeds, or they were paid on drafts drawn by said Wilson for provisions and supplies for the plantation in Lee County,

46 worked by Gardner and Wilson, except $1,009.50, which were paid to R. N. Reed & Co. under garnishment sued out by them against Wilson, on the 15th February, 1868.

To the last direct: I do not know anything.

To the first cross-interrogatory the witness, answering, saith: James Gardner, in the fall of '67, in Macon, notified Hardeman and Sparks that the cotton from his plantation in Lee County, would be sent to them. Cottons were afterwards received as hereinbefore stated, shipped from Wooton station, Lee County, and consigned in the name of James Wilson and Gardner & Wilson. The order to sell came from Wilson. I do not certainly know where said cotton was raised or grown, but am very confident, from freight bills and correspondence and conversation with said parties, that the said cotton was raised in 1867, on the plantation of James Gardner, in Lee County.

To 2d cross-interrogatory: I know nothing of the firm of Gardner and Wilson except that Hardeman and Sparks received cottons consigned to them by such a firm.

To the 3d cross-interrogatory: James Gardner had some

47 conversation with Mr. Sparks in reference to the shipment of cot-

ton from his plantation in Lee County. If he wrote any letters to the firm they cannot be found of file.

To the last cross: I do not know anything more.

THOMAS HARDEMAN.

Sworn to & subscribed before us at Macon, Ga., this 7th day of November, 1868.

JA'S T. NISBET, *Com'r*,
JAMES JACKSON, *Com'r*.

And, on the 20 day of December, 1869, testimony taken on the part of defendant by consent of plaintiff's counsel was received by mail by the clerk, and filed in court, to wit:

Deposition of W. C. Gill, on the part of defendants, endorsed as follows, to wit:

Service acknowledged and copy waived Oct. 12, 1869.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys..

Commission waived. Let any disinterested person take the testimony and return the same to the court. Oct. 25, 1869.

JACKSON, LAWTON & BASSINGER,
Plff's Atty's
LAW, LOVELL & FALLIGANT,
Def'd't's' Att'ys.

48 Fifth circuit court United States, southern district of Georgia.

JAMES GARDNER
vs.
R. N. REED & Co.

Interrogatories to be propounded to William C. Gill, a material witness for the defendants, who resides more than one hundred miles from the place where the above court is held.

1st. Do you know the above-named parties?

2d. What was your official position in the county of Lee and State of Georgia in the year 1867? Did you, at any time, and when, (state the time particularly,) seize any portion, & what, of the cotton-crop raised on the plantations of plaintiff in said Lee County by plaintiff and one James Wilson jointly, in 1867? If you say you made any such seizure, state all the circumstances connected therewith. Were or not the cottons seized by you removed from your possession? If yea, by whom, and how, and where where they carried to? Where was the seizure first made? Where, if at all, did you again get possession of said cottons, & what became of them? State all you know about it.

49 3rd. Do you know of any shipments of cotton of the crop 1867, raised jointly by the plaintiff and James Wilson on the plantations of plaintiff in said county of Lee? If yea, when and to whom were said shipments made? State particularly the time and amount of bales of the shipments, if any were made.

4th. State all you know of the disposition of the cotton crop of 1867, raised on the plantations of plaintiff in said Lee County by plaintiff and James Wilson jointly. Pleas' be particular as to dates and amounts of bales.

LAW & LOVELL,
Def'd't's Att'ys.

Cross-interrogatories.

1st. If you, as sheriff of Lee County, levied on any portion of this cotton in the year 1861, please state whether you had any intercourse with the plaintiff, Gardner, in connection with it.

2nd. By whom, if by any person, was the property pointed out for levy? Did the plaintiff, Gardner, have anything to do with it?

3rd. State all you know that will benefit the plaintiff as fully as if specially interrogated thereto.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

50 *Deposition of W'm C. Gill on the part of the defendants.*

Fifth circuit court of the United States, southern district of Georgia.

JAMES GARDNER }
vs. }
R. N. REED & Co. }

I, K. J. Warren, a disinterested person as to the above case, having, under the consent accompanying said interrogatories, caused William C. Gill to come before me, swear true answers to make to the questions propounded, he, said witness Gill, deposes & answers as follows:

To the first interrogatory he says: I know plaintiff, Gardner; do not know defendant.

To the second int'g he says: I was sheriff in 1867; levied on 80,085 *thousand* pounds of seed-cotton on the 29th December, 1867, which was a portion of the cotton-crop raised on the plantation of James Gardner in Lee County; can't state what portion it was; suppose it was over one-third of what was raised jointly by Wilson & Gardner *or not.* I had a mortgage fi. fa. placed in my hands in favor of R. N. Reed & Co.
vs. James Wilson for fourteen hundred and forty dollars, besides
51 interest & cost; levied it on said cotton as Wilson's property;
went to plantation to make the levy. The cotton was all in the seed. Plaintiff Gardner gave me his word that if I would permit them to go on & *give* [gin] it it should remain there subject to my order. At one time there were 33 bales of said cotton removed, 13 of which were removed without my consent, & never returned to my possession. At another time 23 bales were removed without my consent, seven of which I regained at Wooten & the other 16 at Smithville. There were also 12 shipped off to Hardeman & Sparks, by order of pl'ff Reed's attorneys, Hines and Hobbs. All that were taken off, excepting these 12 bales, were taken by Wilson & Zillman. Levy or seizure first made on plantation of James Gardner, in Lee County. I released the cotton by order of Hines & Hobbs, def'd'ts' att'ys. I know nothing more in answer to this interrogatory.

To the third int'g. witness says: I know of no other shipments, nor any other answer to this interrogatory than I have already made.

To the fourth int'g. witness says: I don't know anything about
52 the joint farming operations of said persons; do not know whether
the farming was joint or not. The cotton was raised on plaintiff Gardner's plantation in Lee.

To the first X-int'g. witness says: I had no interview with Gardner, excepting as stated in answer to the 2d direct.

To the second cross-int'g. witness says: The property was pointed out

in the fi. fa., and also by R. K. Hines. Gardner had nothing to do with it further than before stated.

To the third cross-int'g. he says: I know nothing further that will benefit plaintiff.

WM C. GILL.

Answered, sworn to, & subscribed before me, Dec. 14, 1869.
KITTRELL I. WARREN, *Com'r.*

Testimony of Rob't N. Reed, in court, as agreed upon by counsel.

Fifth circuit court U. States, southern dist. of Georgia.

JAMES GARDNER
vs.
R. N. REED & CO.

It is hereby agreed, between the counsel for pl'ff & de'd'ts in above cause, that upon the trial of the same at the November term of
53 the said court, Robert N. Reed, one of the defendants testified under oath, as follows:

NOVEMBER 26, 1870. I never ratified and approved to James Wilson, as he has sworn, or to any one else, the shipping of the first six bales of cotton to Hardeman and Sparks, of Macon, Georgia, on the 10 November, 1867; nor did I give my consent to him, or to any one else for any other shipments in the future for similar purposes or for any purpose.

When I learned that a portion of the crop of cotton had been shipped to Hardeman and Sparks, I considered the contract between Wilson and our firm under which we assumed to pay Gardner violated, and that by such violation we were released from all obligation under the contract to Wilson and Gardner, or to either of them, and that the contracts, so far as we were concerned, were at an end. I came home to Savannah, determined to protect our firm from loss in the best way I could.

When Gardner drew his draft for two thousand dollars, I refused to pay it; because in the first place we were not bound to pay Gardner anything until the entire crop raised by Gardner & Wilson was in
54 our hands; and, in the second place, the contract under which we were to pay Gardner had been violated by the shipment of a portion of the crop to Messrs. Hardeman and Sparks, and I did not feel that we were bound by any of the terms of the contract any longer.

At the time the draft was drawn, (16 Dec., 1867,) we had advanced to Wilson $7,327.50, and had received from him 92 bales of the crop, the gross proceeds of the sale of which amounted to $5,892.12.

This amount, after the contract was violated, we carried to the credit of our claim against Wilson for the advances, and immediately proceeded, through Messrs. Hines & Hobbs, our attorneys at Albany, Georgia, to foreclose our lien on the crop for the balance. They foreclosed our lien and levied the fi. fa. on the balance of the crop then on the plantation. After the lien fi. fa. was levied, I was in Macon, Georgia, and found in the office of Hardeman & Sparks, 33 bales of cotton, marked James Wilson, in their hands for sale. Finding upon inquiry that the cotton was a part of the crop to which our lien attached, and upon which the fi. fa.
55 had been levied, I immediately went over to the office of Messrs. Lanier & Anderson, attorneys at law, and employed them to institute proceedings against the cotton. This was done and the case was settled by Wilson giving me a draft on Hardeman & Sparks for

$1,009.50, which they paid. There still remained due for our advances, about five hundred dollars, and as the 33 bales had been sent to Hardeman & Sparks, from under the levy of our fi. fa. I immediately wrote to Hines & Hobbs to look after our interest. Upon investigation they found that the rest of the cotton was being shipped away from the plantations, although under levy of our lien fi. fa., and they caught the cotton at Smithville. Wilson there paid the balance of the amount due us, between four and five hundred dollars, and Hines & Hobbs, our attorneys, then released the cotton, and permitted the parties to carry it on to Macon, as all our claims was paid, and we had no further interest in the cotton.

From the time I learned that the first cotton was shipped to Hardeman & Sparks, I considered the obligations of our contract with
56 Wilson at an end, and I endeavored in every way to protect our firm from loss.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

LAW LOVELL, & FALLIGANT,
Def'd'ts' Att'ys.

Trial.

And afterwards, to wit, on the 25th day of November. A. D. 1870, it being the thirteenth day of the November term, of the said court, A. D. 1870, present the Hon. John Erskine, United States judge for the district of Georgia, presiding, the following further proceedings were had in the above-named cause, to wit:

Fifth circuit court U. S., southern dist. of Georgia.

JAMES GARDNER
vs.
R. N. REED & Co.

This cause now came on for trial; the pl'ff appears by Messrs. Jackson, Lawton & Bassinger, his counsel, and the defendants by Messrs. Law, Lovell & Falligant, their counsel; and, the issue being joined, a jury is drawn, to wit: Isaac L. Avant, Curtis G. Lowe, T. B. Whit-
57 field, Joseph Danguix, J. E. Mann, Charles E. Keith, Alex. Doyle, Tho's Pepper, M. W. Burnham, W'm Bailey, Ross Holland, and Levi S. Hart, twelve good & lawful men, of the southern dist. of Georgia, who, being duly chosen, sworn, and empanneled to try issues joined in this cause, when, during the progress of this cause, came an order for adjournment; and the said jury, by order of the court, to appear and reserve the consideration of the cause to-morrow, at 10 o'clock a. m.

And afterwards, to wit, on the 26th day of November, A. D. 1870, came the parties, by their attorneys; and thereupon again came the same jury engaged in the consideration of this cause on yesterday, to to wit: Isaac *C.* Avant, Curtis G. Lowe, T. B. Whitfield, Joseph Danguix, J. E. Mann, Charles E. Keith, Alex. Doyle, Tho's Pepper, M. W. Burnham, W'm Bailey, Ross Holland, and Levi S. Hart, who, having been, as before stated, duly chosen, sworn, and empannelled to try issues joined in this cause, and, after hearing the evidence and arguments of counsel, and receiving instructions from the court, they, the

said jurors of the said jury, upon their oaths, do say and return
58 into court the following verdict, to wit:

Verdict.

"We find for the plaintiff the sum of thirty-eight hundred dollars, with costs of suit."

"November 26, 1870.

"I. L. AVANT, *Foreman.*"

Judgment.

UNITED STATES OF AMERICA,
Southern Dist. of Georgia:

Afterwards, to wit, on the twenty-sixth day of November, one thousand eight hundred and seventy, before the judges of the said court, came the within-named plaintiff, by his att'ys within named, and the said defendant came, by his attorneys; and the jurors of the jury likewise came, who, being called, elected, tried, and sworn to speak the truth of the within contained, upon their oaths say: "We find for the plaintiff the sum of thirty-eight hundred dollars, with costs of suit."

Therefore, it is considered that the said plaintiff do recover against the said defendants damages aforesaid, by the jurors of the jury aforesaid in form aforesaid assessed, and also his costs and charges aforesaid, to the said plaintiff, by the said court now here, of increase, adjudged, and with his assent; and the said defendants, in mercy, &c.

JACKSON, LAWTON & BASSINGER,
Pl'ff's Att'ys.

59 Judgment signed & filed this 28th day of November, A. D. 1870.

JAMES McPHERSON, *Clerk.*

Bill of exceptions.

And afterwards, on the 7th day of December, A. D. 1870, came the defendants, by their attorneys, and filed their bill of exceptions, duly settled, allowed, and signed, in the words following, to wit:

JAMES GARDNER
vs.
R. N. REED & Co. } November term, 1870.

Upon trial of the above cause, and after argument of counsel, the Honorable John Erskine, United States district judge, presiding in the absence of the circuit judge, charged the jury, among other things, as follows:

1st. According to the two contracts, construed together, the actual shipment of the entire crop by James Wilson, under the agreement to ship the entire crop of cotton raised on the two plantations of James Gardner, by Gardner & Wilson, during the year eighteen hundred and sixty-seven, to R. N. Reed & Co., and to be by them sold on commission, &c., was not a condition precedent to the liability of R. N. Reed & Co. to pay James Gardner the sum of four thousand dollars, but was
60 a condition subsequent; therefore R. N. Reed & Co. became liable to pay to James Gardner the sum of four thousand dollars

in any event, as soon as they had in hand the net proceeds of the cotton to the amount of four thousand dollars, if the rent was due and unpaid.

To which charge of the said judge the said defendants now here in open court except, and assign as cause of exception that said charge was erroneous in law.

II. That the said judge charged the jury that the plaintiff Gardner's lien or priority of payment for rent as landlord on the crop raised by Gardner and Wilson was superior to all other liens.

To which charge of the said judge the said defendant, now here in open court, excepts, and assign as cause of exception that the said charge was erroneous in law.

III. That the said judge charged the jury: "If you find hat any of the crop was shipped to any other factors or persons than R. N. Reed & Co., then the contract between Wilson and Reed & Co. may thus have been violated, and Reed & Co. may thereby have been released from their obligation upon the contracts to James Wilson, but they were not by such violation, if there was a violation, released from their obligation to pay James Gardner four thousand dollars rent out of first proceeds of crop.

61 To which charge of the judge the said defendants, now here in open court, except, and assign as cause of exception that said charge was erroneous in law.

IV. That said judge charged the jury: There is evidence tending to show that, on the tenth day of November, 1867, when the six bales of cotton had been shipped to Hardman and Sparks, at Macon, there were in possession of defendants some seventy (70) bales of cotton shipped to them by Wilson, of the crop of 1867; therefore if the defendants were in possession of a sufficient sum arising from the proceeds of the crop, or a part of the crop of cotton, when the rent became due to the plaintiff for the lands, and the rent was demanded, it was the duty of defendants to have paid it out of said proceeds, notwithstanding the entire crop was not then or afterwards delivered to defendants."

To which charge of the said judge the said defendants, now here in open court, except, and as cause of exception assign that the said charge was erroneous in law.

V. That the said judge charged the jury: "The language in the agreement between plaintiff and Wilson that the rent was first to be paid out of the proceeds of the cotton, does not mean that the rent was not to be paid until the entire crop was sold. This agreement, at least so far as it related to the rent, became a part of the contract entered into between defendants and Wilson."

62 To which charge of the said judge the said defendants, now here in open court, except, and assign as cause of exception that the said charge is erroneous in law.

And for further exception the said defendants excepts to the several refusals of the said judge to charge the jury as requested on the trial in writing by defendants' counsel:

1. That the consignment and shipment of the entire crop grown by Gardner and Wilson, during the year 1867, to R. N. Reed & Co., was a condition precedent to the liability of R. N. Reed & Co. to pay to the plaintiff, Gardner, the amount claimed in this suit.

To the refusal of said judge to charge as above requested, the said defendants, now here in open court, except.

2nd. That Gardner, the plaintiff, had no lien as landlord on the crop of Gardner and Wilson for rent, good as against factor's lien, until

Gardner had levied his distress warrant on the crop for the recovery of the rent.

To the refusal of the said judge to charge as in this item requested, the said defendants, now here in open court, except.

3rd. That Reed & Co.'s liability to Gardner is not absolute, but conditioned upon the performance of his contract with Reed & Co., and if Wilson violated the contract, Reed & Co. are discharged.

To the refusal of the said judge to charge as in this item re-
63 quested, the said defendant' now here in open court, except.

4th. That the contract of Reed & Co. to Gardner could not be absolute without the extinguishment of Wilson's debt to Gardner for four thousand dollars rent as per agreement.

To the refusal of said judge to charge as in this item requested, the said defendants, now here in open court, accept.

LAW, LOVELL AND FALLIGANT,
Defendants' Attorneys.

I hereby certify that the above exceptions were taken in open court upon the trial of the above cause, and that they are correct in fact.

Witness my official signature this twenty-sixth day of November, eighteen hundred and seventy, and my seal.

[SEAL.] JOHN ERSKINE, [SEAL.]
U. S. Dist. Judge, Sitting at Circuit.

Attest:
JAMES MCPHERSON, *Clerk.*

Writ of error.

And afterwards, to wit, on the 8th day of December, A. D. 1871, a writ of error was duly issued in the words following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of Georgia, greeting:

64 Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you in an action of assumpsit between James Gardner, plaintiff, and Rob't N. Reed, and W. Morgan Weaver, copartners, under the firm name of R. N. Reed & Co., defendants, a manifest error hath happened to the great damage of the said Robert N. Reed and W. Morgan Weaver, copartners as aforesaid, (as by their complaint appears,) we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said

65 Supreme Court, the eighth day of December, in the year of our Lord one thousand eight hundred & seventy.

[SEAL.] JAMES McPHERSON, *Clerk.*

Allowed by—

JOHN ERSKINE,
U. S. Dist. Judge for Georgia, Sitting at Circuit.

Bond.

And afterwards, on the the 8th day of December, A. D. 1870, came the defendants, by their counsel, and filed their bond to the plaintiff, duly approved by the district judge, in the words following, to wit:

R. N. REED & CO., PLAINTIFFS IN ERROR,
vs.
JAMES GARDNER, DEF'D'TS IN ERROR.

Know all men by these presents that we, Robert N. Reed and W. Morgan Weaver, copartners, doing business in the city of Savannah, in the said southern district of Georgia, under firm-name of R. N. Reed & Co., principals, and William H. Stark and Henry P. Richmond, of said city of Savannah, securities, are held and firmly bound unto James Gardner, of the city and State of New York, the above-named plaintiff, in the sum of eight thousand dollars, to be paid to the said James
66 Gardner, his executors or administrators; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated at said city of Savannah, this eighth day of December, in the year eighteen hundred and seventy.

Whereas the above-named R. N Reed & Co. have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the said fifth circuit court of the United States for the southern district of Georgia:

Now, therefore, the consideration of this obligation is such, that if the above-named R. N. Reed & Co. shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

R. N. REED. [SEAL.]
W. MORGAN WEAVER, [SEAL.]
By R. N. REED.
R. N. REED & CO. [SEAL.]
W. A. STARK,
P'r HENRY P. RICHMOND, *Att'y.* [SEAL.]
HENRY P. RICHMOND. [SEAL.]

Sealed and delivered in presence of, and approved by,
JA'S McPHERSON, *Clerk.*

Approved:

JOHN ERSKINE,
U. S. District Judge, Sitting at Circuit.

67 *Citation.*

Whereupon a citation was duly issued and returned in the words following, to wit:

R. N. REED & CO., PL'FF IN ERROR,
vs.
JAMES GARDNER, DEF'D'T IN ERROR.

The United States of America to James Gardner, of the city, county, and State of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the fifth circuit court of the United States of America for the southern district of Georgia, in a cause therein pending, wherein Robert N. Reed and W. Morgan Weaver, copartners, under the firm-name of R. N. Reed and Co., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment of said circuit court rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and
68 why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and seventy.

JOHN ERSKINE,
U. S. Dist. Judge, Sitting at Circuit.

Service.

We, the attorneys of James Gardner, the defendant in error, and of record in the within cause, do acknowledge service upon us of a true copy of the within citation on this 8th day of December, 1870.

JACKSON, LAWTON & BASSINGER,
Att'ys for James Gardner, Pl'ff.

Clerk's certificate.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I, James McPherson, clerk of the fifth circuit court for the southern district of Georgia, do hereby certify that the foregoing sixty-eight pages of writing, contain a full, true, and complete copy of the state of the pleading, the statement of facts, and of the proceedings
69 in the above-named cause, as they remain of record on the records of the said circuit court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this eighth day of June, A. D. 1871.

[SEAL.] JA'S McPHERSON, *Clerk.*

(Indorsement on cover:) No. 485. Robert N. Reed & W. Morgan Weaver, copartners as R. N. Reed & Co., plaintiffs in error, vs. James Gardner. S. Georgia C. C. U. S. Filed 6th December, 1871.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

R. N. REED & CO.,
PLAINTIFFS IN ERROR,
vs.
JAMES GARDNER.

No. 46.

This cause comes up by writ of error to the Circuit Court of the United States for the Southern District of Georgia.

An action of *indebitatus assumpsit* was brought by Gardner against Reed & Co., in which judgment was given for the plaintiff. The defendants below bring this writ of error to reverse the judgment.

I.

It may facilitate an understanding of the questions involved, to say that the transaction out of which the controversy arose appears to have been this:

Gardner, owning two plantations in Georgia, entered into an agreement with Wilson,* whereby (1st) he and Wilson were each to furnish a number of mules, implements, &c., to raise a crop of cotton; (2d) Gardner was to furnish a certain quantity of forage, already on the place, for the animals; (3d) Wilson was to furnish provisions and money to defray all expenses, including the reimbursement to Gardner of expenses already incurred by him; then when the crop was made, it was to be sent to some

*The agreement was made by Gardner with Wilson and one Boynton, but Boynton, a few days after, assigned his interest to Wilson, and withdrew from the concern.

factor and sold; and out of the proceeds (4th) Gardner was to have $4,000 as "rent" for the plantations; (5th) Wilson was to have back all his advances; (6th) the residue was to be divided equally between the parties; and, moreover, (7th) all the stock was to be sold and the proceeds divided, *pro rata*, according to the value contributed by each; (8th) the forage was to be repaid in kind.

Wilson, on the 31st of May, entered into a contract with the defendants, whereby they agreed that they would make him certain advances of money and provisions, and he agreed that he would send them "the entire crop" of cotton raised by him and Gardner, for sale; "and that a sufficient portion of the net proceeds of said cotton shall be applied by them to the payment of all amounts advanced by them, after the first four thousand dollars, as per contract of Gardner and Wilson, is provided for." (Rec. p. 16.)

The defendants advanced about $7,329.60. Wilson did not send them the whole crop, but only 92 bales out of a crop of 244 bales; and the proceeds of the 92 bales did not cover the defendants' advances. Nevertheless, Gardner brought an action in his own name against Reed & Co. for the $4,000, and was allowed to recover.

Can this judgment be sustained?

II.

We proceed now to state the case in the form in which it appears on the record.

Pleadings.

On the 24th of March, 1868, Gardner, here the defendant in error, sued R. N. Reed & Co., here plaintiffs in error, in *indebitatus assumpsit*, declaring upon a debt arising out of an agreement made between the defendants on the one part, and one James Wilson on the other part, whereby the defendants promised that if the said Wilson would send them 100 bales of cotton, to be sold for Wilson's account, they would pay to the said Gardner, the plaintiff,

the sum of $4,000 out of the net proceeds of the same. The plaintiff avers that the 100 bales were sent to defendants and sold, and that the net proceeds amounted to $9,000, whereby the defendants became liable to pay the plaintiff $4,000, and being so liable, promised to pay when requested, but the defendants being by him thereto requested, refused to pay him the sum of $4,000. (Record, pp. 1, 2.)

The declaration also contained a count for money had and received. (Record, p. 2.)

The defendants pleaded the general issue, on which issue was joined. (Record, p. 3.)

The defendants afterward, by an amended plea, pleaded that by the agreement between them and Wilson they were to make him advances, and he was to ship to them *the entire crop* of cotton raised by Gardner and Wilson on Gardner's land, out of which their advances were to be repaid, after the first $4,000, as per contract with Gardner; and that Wilson had failed to perform his agreement, and sent the larger portion of his cotton to other parties for sale. (Record, p. 4.)

They also pleaded set off. (Record, pp. 4, 5.)

The plaintiff replied that some of the cotton was sent to other factors by the consent of the defendants. (Record, p. 8.) And as to the plea of set off, plaintiffs replied, "Not indebted." (Record, p. 8.)

There were other pleas, replications, and demurrers, but they were withdrawn. (Record, p. 4, first plea; p. 6, replication; pp. 7, 8, demurrer.)

Evidence.

Upon the trial evidence was given by plaintiff tending to prove that Gardner and Wilson, together with one Boynton, by an agreement in writing on the 5th of March, 1867, agreed to cultivate two plantations belonging to Gardner "*in copartnership*," Gardner furnishing certain mules and utensils, described and valued, and Boynton and Wilson to pur-

chase and put in all other necessary stock at cost—the stock so put in to be sold at the expiration of the year, and proceeds divided *pro rata.*

Boynton and Wilson were also to furnish all "the money, provisions, and supplies of all kinds," and to refund $1,400 already spent on the place.

Out of the proceeds of the sale of crops, Gardner was first to have $4,000 for rent of the plantations. Then Boynton and Wilson were to have their outlay repaid, and the residue of the proceeds was to be divided, one-half to Gardner and the other half to Boynton and Wilson. The crop was "to be shipped to a factor or factors to be agreed upon in Macon or Savannah, who [was] to hold the cotton crop subject to the terms of this agreement." (Record, pp. 14, 15, Exhibit A.)

Also that Boynton afterwards (March 30th) transferred his interest to Wilson. (Record, p. 15.)

Also that Wilson, on the 31st of May, made an agreement with R. N. Reed & Co., by which, in consideration of advance to be made by Reed & Co. to him, "to assist (him) in raising a crop upon the plantation owned by James Gardner, of New York, and cultivated by himself and James Gardner," Wilson pledged himself to ship "*the entire crop of cotton*" raised this year on said plantation, and "that a sufficient portion of the net procoeds of said cotton shall be applied by them to the payment of all amounts advanced by them after the first four thousand dollars, as per contract of Gardner & Wilson, is provided for, the said contract being shown to defendants." (Record, pp. 15, 16, Exhibit B.)

Also that Wilson sent defendants about 92 bales of cotton, the net proceeds of which were more than $4,000.

The defendants offered evidence tending to prove that they advanced $7,329.60, of which, *it seems*, $5,448.17 were for cash and provisions, and the residue, $1,881.43, for freight taxes and other expenses on the cotton sent

them. The gross proceeds were $5,892.12. (Record, pp. 7, 8, and 21.)

Also that Wilson, out of a crop of [92 plus 136 plus 16] 244 bales of cotton, sent them only 92 bales (Record, p. 12, fol. 29), and sent 152 bales to other parties, viz: 136 bales to Wardeman & Sparks (Record, p. 18), and 16 bales to Woolfolk & Anderson (Record, p. 13, fol. 31).

Also that after Wilson had sent some cotton to other factors, and thus disabled himself to perform his undertaking, they had instituted proceedings to enforce their lien on the crop, and had thereby secured the reimbursement of their advances; and that then, and not before their attorneys released the cotton, and in no other way had they assented to the sending of it to other factors. (Rec. p. 12.)

III.

Charge.

The judge charge the jury (Record, pp. 23, 24):

1. That by the true construction of the written contracts the shipment of the *entire crop* was not a condition precedent to the payment of the $4,000, but that the defendants were bound to apply the first net proceeds of whatever cotton was sent them to the payment of the $4,000.

2. That Gardner had a lien upon the crop for rent, superior to all other liens.

3. That, although by shipping cotton to other factors Wilson may have violated his contract, still such violation did not discharge defendants from their obligation to pay plaintiff $4,000.

4. That if the defendants were in possession of a sufficient sum arising from the proceeds of the crop or part of the crop, when the rent became due to the plaintiff, and the rent was demanded, it was the defendant's duty to have paid it out of the proceeds, notwithstanding the entire crop had not been forwarded.

5. That the language in the agreement between the plaintiff and Wilson (Exhibit A) that the rent was first to be paid out of the proceeds of the crop does not mean that it was not to be paid until the entire crop was sold, and that this agreement became a part of the contract between defendant and Wilson.

And the judge refused to instruct the jury as requested by defendants. (Record, pp. 24, 25.)

1. That the shipment of *the entire crop* to defendants was a condition precedent to the liability to pay plaintiff $4,000.

2. That plaintiff had no lien on the crop good as against the factor's lien, until he should have levied his distress warrant on the crop.

3. That defendants' liability was not absolute, but dependent on the performance of Wilson's contract.

4. That the contract of defendants could not be absolute without extinguishing Wilson's debt to Gardner.

To all these charges and rulings exception was duly taken by the defendants "*on the trial.*" (Record, p. 25, fol. 63.)

The jury rendered a verdict in favor of the plaintiff for $3,800 (being the $4,000 less $200 received by plaintiff from Wolfolk & Anderson), and judgment was given accordingly.

IV.

Assignment of Error.

1. The court erred in giving judgment upon the verdict. The verdict was bad, because it gave entire damages upon two counts in the declaration, on one of which, the first, no action would lie.

2. The court erred in each of the charges excepted to, except the fifth, and in each refusal to charge as prayed by

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the defendants, for all the parts excepted to embody one or the other of these three errors:

a. That Gardner could recover upon the contract, although Wilson had not performed his undertaking.

b. That Gardner could have any right at action *upon the contract.*

c. That Gardner, as landlord, had a lien upon the crop superior to all other liens.

First Error.

The rule that when the plaintiff counts upon two promises, one of which is without consideration, or otherwise no ground of action, and the jury give entire damages, the judgment will be arrested, is well settled.

"If an action upon the case is brought upon two promises, and both are found for the plaintiff, the jury may give entire damages for both, for this is at the peril of the plaintiff; but if the action does not lie for one of them, the plaintiff shall not have judgment for the other." (Bac. Abr. Damages, D. 3.)

Bac. Ab. Verdict L., citing Clark *vs.* Martin, Salk., 129, 364, lays down the same rule, and the editor's note says the rule "that when there are several counts, entire damages, and one count is bad, this shall be fatal, is now fully settled *in civil cases.*"

In Sayer *vs.* Jewett, 12 Wendell, 135, Nelson, J., said:

"The third count is bad, and the better opinion appears to be that the defect is not cured by the verdict, and that the defendant is entitled to have the judgment reversed. (Cro. Jac., 126; 2 Str., 934; 2 Ch. Pl., 263, w; 7 Johns. R, 359."

In this case the plaintiff counted upon a promise made upon consideration of a liability which did not exist, and also upon a promise of which the consideration was an existing debt. One promise may be valid, the other is not. The first promise was not valid, for while it has been held

5. That the language in the agreement between the plaintiff and Wilson (Exhibit A) that the rent was first to be paid out of the proceeds of the crop does not mean that it was not to be paid until the entire crop was sold, and that this agreement became a part of the contract between defendant and Wilson.

And the judge refused to instruct the jury as requested by defendants. (Record, pp. 24, 25.)

1. That the shipment of *the entire crop* to defendants was a condition precedent to the liability to pay plaintiff $4,000.

2. That plaintiff had no lien on the crop good as against the factor's lien, until he should have levied his distress warrant on the crop.

3. That defendants' liability was not absolute, but dependent on the performance of Wilson's contract.

4. That the contract of defendants could not be absolute without extinguishing Wilson's debt to Gardner.

To all these charges and rulings exception was duly taken by the defendants "*on the trial.*" (Record, p. 25, fol. 63.)

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a. That Gardner could recover upon the contract, although Wilson had not performed his undertaking.

b. That Gardner could have any right at action *upon the contract.*

c. That Gardner, as landlord, had a lien upon the crop superior to all other liens.

First Error.

The rule that when the plaintiff counts upon two promises, one of which is without consideration, or otherwise no ground of action, and the jury give entire damages, the judgment will be arrested, is well settled.

"If an action upon the case is brought upon two promises, and both are found for the plaintiff, the jury may give entire damages for both, for this is at the peril of the plaintiff; but if the action does not lie for one of them, the plaintiff shall not have judgment for the other." (Bac. Abr. Damages, D. 3.)

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In this case the plaintiff counted upon a promise made upon consideration of a liability which did not exist, and also upon a promise of which the consideration was an existing debt. One promise may be valid, the other is not. The first promise was not valid, for while it has been held

in some cases, that if A places in the hands of B money to be paid to C, or if B, for a consideration moving from A, promise A to pay money to C, C may maintain an action; yet the rule is that C must have the exclusive interest upon the agreement; the promise must be simple and single, and leave nothing to be settled between the original parties.

In Sailly *vs.* Cleveland, 10 Wend., 156, 159, the case was thus: The defendant having received certain chattels from the plaintiff, to be delivered to a stranger, undertook to so deliver them, but failed to perform his undertaking. The plaintiff and the stranger were both public officers, one a collector and the other a marshal, and it was urged by the defence that the sole duty of plaintiff was fully performed by delivering the chattels to the defendants, to be transferred to the third person, and therefore that the plaintiff had no interest in the agreement, and could not maintain the action, which should have been brought by the marshal. The court, however, reviewing the old cases, said that they allowed a recovery by a third party, only where the plaintiffs had the entire interest.

In Blymire *vs.* Boistle, 6 Watts, 182, Gladstone, being indebted to Boistle, conveyed land to Blymire, who undertook to pay Boistle. Failing to do so, Boistle sued him. The court said the action would not lie; that the contract was made by Gladstone for his own benefit, and consequently he could still sue on it; and so, if Boistle could sue, two actions would lie on the same contract for the same breach, which could not be permitted.

In Ross *vs.* Milne and wife, 10 Leigh, 204, the plaintiff sued upon promises by deed and parole made by the defendant to S, to pay the plaintiff certain moneys after the death of S. The court held that the action would not lie, but must be brought by the representative of S.

Addison on Contracts lays down the rule that no action can be maintained upon a promise made to a stranger;

and he explains the cases where the contrary is supposed to have been held by showing, or attempting to show, that the consideration, in fact, moved from the plaintiff, either because he actually, in person, performed the act which constituted the consideration, or procured it to be done, or it was performed by a father or near relative expressly for his benefit, and by his procurement, so, that in legal contemplation the agreement was made by the plaintiff himself. (Add. Cont., 941.)

Now in the present case unquestionably the contract was made for Wilson's benefit, and Wilson could still sue upon the contract. The declaration avers that the plaintiff was entitled to a part only of the proceeds of the cotton; Wilson could sue for the residue. Moreover, whether the plaintiff was entitled to anything depended upon the settlement of accounts between the defendants and Wilson, for the declaration avers that the defendants were to be first paid for their services and expenses. How much this should be was a matter between Wilson and the defendants, and could be settled only in a suit between them.

Then there is, in the contract set out in the pleadings, no agreement to pay anythingwhatever to Gardner. The agreement is that if Wilson will send the entire crop to the defendants they will look to the residue only over and above $4,000 for their security for their advances. What is to be done with the $4,000 is nowhere determined; necessarily it is to be paid to Wilson, who was to send the cotton, or if to any one else, then to Gardner and Wilson who raised the cotton. But that the defendants were in any way to come under liability to Gardner nowhere appears by the contract. They do not promise to pay anything to him, and his claim upon the proceeds is mentioned solely to limit the amount which Wilson could pledge for his debt, and which the defendants agreed to accept as security for that debt.

Nor though the declaration avers a promise from the

defendants to pay the plaintiff, can that help the case, for the promise is alleged to have been in consideration that the defendants were indebted to him by reason of the premises; but as was observed by the court in Ross *vs.* Milne above cited, debt would never lie upon a promise to a third person in any case whatever, but only special assumpsit, and there being no debt there was no consideration for the alleged promise.

Second Error.

The judge in his charge appears to have assumed certain facts as proved, and instructed the jury that in matter of fact the defendants became liable to pay, and the plaintiff had a lien. (See first and second portions of charge, record, pages 23, 24.) This part of the charge was error unless it be construed in connection with the pleadings or written evidence, and the facts as assumed by the court be there admitted.

It may be construed to apply to the contract set forth in the defendants' amended plea, (record, page 4,) which is admitted by the plaintiff's replication. (Record, page 8.) Or it may be construed in connection with the evidence found in the transcript, pages 9 to 18, and which the clerk certifies remains "of record on the records of said circuit court." (Record, page 27.)

Supposing, *first*, the charge is founded upon facts admitted in the pleading, it can only be referred to the contract set up in the special plea, of which the non-performance by Wilson is there alleged and is admitted by the replication, (pages 7 and 8.) Under the code of Georgia, see 3381 to 3388, the plaintiff states his case in a petition, and the defendant is required to state his defence "plainly, fully and distinctly." In these pleadings the plaintiff declared on a certain contract, the defendant pleaded the general issue, and afterwards put in a special plea setting forth a contract differing in some re-

spects from that declared on, and alleged that the plaintiff had not performed his part. The plaintiff replied and pleaded that performance had been dispensed with by the defendant. No merely formal pleadings being required by the code, the petition and answer made the case for the jury. A reasonable construction of those pleadings we think is to consider them as admitting that the contract between the parties was the one set forth in the amended plea, and that Wilson did not perform his agreement, and as showing that the plaintiff alleged and the defendant denied that the defendants had discharged the plaintiff from performing the same.

Construing the instruction then in connection with the pleadings, the charge in the first exception is clearly erroneous, and for two reasons: First, the sending of the whole crop by Wilson was a condition precedent to the right of Gardner to recover; and second, whether it was, or was not, Gardner could not maintain any action on the contract. This last point, however, has been already discussed, and we have only now to notice the first branch of the objection.

Then if Gardner could sue on the contract, he could only maintain the action by showing that Wilson had performed his part.

Suppose there had been an express promise by Reed & Co. to pay Gardner; then the case would be, that in consideration that Wilson agree to send his entire crop to Reed & Co., they agreed to advance certain money before the receipt of the crop, and out of the proceeds of the crop, first to pay commissions and expenses, then to pay Gardner $4,000, then to retain such sum as they had advanced. Then Wilson failed to perform his part, violated his contract, and disabled himself to perform it by sending some cotton to other factors. Were Reed & Co., nevertheless, bound to go on and perform all that they had conditionally agreed to do?

The sending of the entire crop was, in the nature of the case, the consideration upon which the undertaking was based.

This was an entire contract, and could not be apportioned. There was an entire consideration for an entire thing, and such a contract cannot be apportioned, and no recovery can be had on the *contract* without full performance. (7 Parsons on Contracts, Part 2, chap. 1, sec. 5, p. 32.

The promises were dependent, one act being the consideration for the other.

"It may also be laid down as a rule, that stipulations or promises may be dependent from the nature of the acts and the order in which they must necessarily follow each other.

"When the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent without express words." Per Shaw, C. J., in Milldam Foundery *vs.* Hovey, 21 Pick., 439. (2 Parsons Cont., 45, note l.)

The sending of the whole crop was of the essence of the contract. Reed & Co. had contracted to advance a certain sum upon the security of the whole crop. The consideration to them was the commissions they may derive from selling the whole crop. For this they were willing to risk the chance that the proceeds would fall short of the sum that they had engaged to pay, and had the whole crop been forwarded they would have had to pay Gardner the $4,000, whether the residue of the proceeds covered the previous advances or not. But it was upon no other consideration that they agreed to pay the $4,000, and we are confident that, whatever may be the doctrine of indepen-

dent covenants, no case can be found where a plaintiff who has not performed his part of an entire contract, although the time has passed for performance, has been permitted to recover on such contract.

The doctrine of independent covenants then does not apply here. But if it did and the agreements were independent, still in an action, for the breach of one defendant might recoup in damages for the breach of the other by the plaintiff. (2 Parsons on Contracts, 246.) And the doctrine contended for by the plaintiff, that the plaintiff in this cause was entitled to the net proceeds to the amount of $4,000, in any event would prevent, and the charge of the judge did prevent, any such recoupment.

If the contract had been, first, that Reed & Co. should advance so much money before the delivery of the crop; second, that Wilson should deliver all the crop; and third, that Reed & Co. should, at a certain day, pay Gardner $4,000, the case would have been different. But here, if Gardner was entitled to anything from Reed & Co., it was the whole $4,000; and the question is whether Reed & Co. agreed to pay the $4,000 on the faith of Wilson's *promise* to send the whole crop, or upon the receipt of the whole crop. The consideration was either the promise to do the act or the doing of the act; and nothing can be more certain than that Reed & Co. did not agree to pay Gardner $4,000 on the faith of Wilson's promise, and that in the order of time the receipt of the whole crop was to precede the payment.

The fact that Wilson had sent part of the crop to other factors, and thus disabled himself to perform the contract, is stated in the answer, and admitted by the replication, pp. 4, 8, and warranted the defendants in treating the contract as rescinded.

On these grounds the first, third and fourth exceptions to the charge, and the first and third exceptions to the refusal to charge as prayed, must be sustained.

Third Error.

The court also charged that the lien of Gardner for rent, as landlord, on the crop raised by him and Wilson, was superior to all other liens (second exception to charge), and refused to charge that the lien did not attach until Gardner had levied his distress warrant.

The act of 1811 (Cobb's Digest to 1851, vol. 1, p. 900, title, Rent,) seems to have taken away the right of the landlord to distrain, and requires him to resort to process issued upon his oath, and this act gave the party distrained a remedy by replevin.

The code of December, 1860, provides that the landlord's lien for rent shall attach from the time of levying his distress (article 2,268), and the instruction asked by the defendant is almost in the words of this statute.

But, in fact, the relation of landlord and tenant never existed. The plea shows that Wilson never *held* the lands, But was simply engaged, under an agreement, to *aid* Gardner in making a crop on his own land. This does not create the relation of landlord and tenant. (Bradish *vs.* Schenck, 8 Johns, 151.)

The code of 1860 (section 2,261) provides that the relation of landlord and tenant exists when the owner of lands grants to another the right *to possess and enjoy the use* of such lands.

If these positions be sound, the instructions of the court were not only not warranted by the pleadings, but were irreconcilable with the facts admitted by the pleadings.

V.

We have heretofore considered the exceptions apart from the evidence contained in the transcript. The evidence, however, does not change the aspect of the case. It leaves the main feature of the case, indeed, precisely as it was made by the pleadings—the contract and non-per-

formance admitted, and the excuse for non-performance left at issue. The only material additional fact appearing in evidence is the contract between Wilson and Gardner; but this would only strengthen the defence by showing that Wilson and Gardner were actually co-partners in raising the crop, and that there was a special provision for selling the crop inconsistent with any lien in favor of Gardner. It is enough, however, to say that the evidence justifies the charge of the court still less than do the pleadings.

But if the court shall think that the evidence is not in the record in proper form, still it cannot be doubted that such evidence was given and that the charge of the judge was based upon it. And as in the case of Tweed *vs.* Flanders, 9 Wall., 425, 432, the judgment should be reversed and the cause remanded for a new trial, this course being uniformly adopted as more conducive to justice than to affirm a judgment in a case where it plainly appears that the court mistook the law, though the mistake is not so presented as to be corrected by this court.

VI.

Conclusion.

We submit that the judgment should be reversed and the cause remanded for a new trial.

J. M. CARLISLE,
J. D. McPHERSON,
R. FALLIGANT,
for Plaintiffs in Error.

Supreme Court of the United States.

R. N. Reed & Co., Plaintiffs in Error
v.
James Gardner, Defendant in Error.
No. 243.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

After striking from the transcript the evidence in the case below, improvidently incorporated into the transcript by the clerk, and found in the printed transcript, from sec. 19, p. 8, to sec. 52, p. 22, all that the court can know of this case judicially is as follows:

The declaration (pp. 1 and 2) sets forth, in a special count, that in consideration that one James Wilson would deliver to the defendants below divers goods and chattels, to wit, one hundred bales of cotton, to be sold by the defendants for said Wilson on commission, the said defendants promised said Wilson to endeavor to sell said cotton, and out of the proceeds to pay to James Gardner, the plaintiff below, the sum of $4,000, which the said Wilson then owed to said Gardner. Declaration then averred delivery by Wilson of the cotton to the defendant below for the purposes aforesaid, and that the said defendants sold said cotton on account of said Wilson, for a large sum of money, to wit, $10,000; the net proceeds amounting to a large sum, to wit, $9,000, whereby the said defendants became liable to pay to the said James Gardner, plaintiff below, the said sum of $4,000, which they promised to do.

The declaration contains also a special count for money had and received, and concludes with the usual allegations of breaches of the said promises.

The bill of particulars is as follows:

"R. N. REED & Co.,

"To JAMES GARDNER, DR.

"1867.

"For cash received by you from proceeds of cotton sent you by James Wilson, to be paid me---------- $4,000."

The pleadings were as follows:

1st. General issue, and *similiter*.

2d. A special plea, alleging that defendants below entered into an agreement with Wilson, by which it was agreed, in consideration of advances to be made to him by said defendants, to assist him, Wilson, in making a crop on the plantations owned by Gardner, and cultivated jointly by said Gardner and Wilson, the said Wilson pledged himself to ship as fast as it could be picked out, to the defendants below, for sale on commission, the whole cotton crop raised in 1867 on said plantations, and that a sufficient portion of the net proceeds of said cotton should be applied by the defendants to pay their advances to Wilson after the first $4,000, as per contract of said Gardner and Wilson, was provided for. Aver, that Wilson failed to send his entire crop to the defendants, but sent larger portion to other persons for sale, after receiving advances of $7,329 05, contrary to his agreement, which being a condition precedent to the performance of the agreement by defendants, they ought not to be bound to the performance of their agreement.

3. A special plea that Gardner was indebted to the dedefendants below in the sum of $7,329 50 for advances to said Gardner and Wilson to make a crop on said plantations, cultivated jointly by said Gardner and Wilson, which sum exceeds the sum of $4,000 claimed by Gardner.

4. A notice of set-off for account of advances to Wilson's itemized bill of $7,329 60.

The plaintiff to the second special plea replied, that so much of the crop of cotton as was sent by Wilson to other factors than the defendants, was so sent with the assent and ratification of defendants.

Replication to the third special plea, that Gardner was not indebted in manner and form to defendants as said defendants alleged, and putting himself on the country.

In thus stating the pleadings no mention is made of a plea and demurrer thereto, withdrawn by consent.

With the issues thus raised the parties went to trial, and the jury found for the plaintiff below the sum of $3,800, with costs of suit.

The defendants below have brought the case here on a bill of exceptions.

I. We object for the defendant in error that the bill of exceptions is imperfect, and raises no question which this court can consider.

1. The evidence returned by the clerk is no part of the transcript, cannot be taken notice of by this court, and so can lend no aid to the exceptions.

"Evidence, whether written or oral, and whether given to the court or jury, does not become a part of the record, unless made so by some regular proceeding at the trial and before the rendition of the judgment."

Suydam *v.* Williamson, 20 How., 433.

Neither depositions nor exhibits constitute "any part of the record on which the judgment of an appellate court is to be exercised, unless made a part of it by a bill of exceptions, or in some other manner recognized by law."

Williams *v.* Norris, 12 Wheat., 117.

Lincoln *v.* Clofin, 7 Wall., 136.

"The unauthorized certificate of the clerk of the court that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record, so as to bring it to the cognizance of this court."

Lessor of Fisher *v.* Cockrell, 5 Peters, 254.

"What purports to be the entire deposition of Baker is sent up by the clerk of the district court and is presented in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be a part of the record of the case. It is only a useless incumbrance of the transcript."

Russell *v.* Ely, 2 Black, 580.

Transcript properly consists of four parts: 1st. A statement of the pleadings or their substance. 2d. A statement of the impanneling of the jury to try the issue, the trial, and the verdict. 3d. The bill of exceptions. 4th. The judgment.

Curtis' Commentaries, p. 512.

The evidence is no part of the transcript, and in considering the case here we are to proceed as if there was no such matter in the transcript.

2. The exceptions to the ruling of the judge, and his refusals to rule as required, are unintelligible, without knowledge of the contract between Gardner and Wilson and Reed & Co. and Wilson referred to in the first exception as the "two contracts," and these contracts are not set forth or identified in the exceptions.

"The bill of exceptions should contain, by way of recital, so much of the evidence given on the trial, or the material facts, as is necessary to present the points of law ruled and excepted, and no more."

Ibid., p. 512.

Where the rulings of the court on letters and papers is made the subject of exception, they must be inserted in the bill.

United States *v.* Dimham, 21 Law Reporter, p. 591.

When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter and number, or other means of identification mentioned in the bill, as

to leave no doubt when found in the record that it is the one referred to in the bill of exceptions; otherwise it will be disregarded. That a copy of a paper is attached to a pleading in the case which purports to be the same as the paper mentioned in the bill of exceptions, does not make a part of that bill.

Leftwitch *v.* Lacuna, 4 Wall., 187.

In this case no written contracts are set forth in the pleadings, and as the evidence is no part of the transcript, the court here has no judicial knowledge of any written contracts in the case. The exceptions set forth no such contracts, and in nowise identify any such contracts. The vague terms used in the exceptions, "the two contracts," is not sufficient to identify, as the court here has no judicial knowledge of any contracts, though the evidence refers to more than two contracts.

The exceptions, in determining their sufficiency, are to be considered as if the evidence was not in fact printed in the transcript. In that way we perceive their entire insufficiency.

Conclusion is drawn that we are to consider the case as if there was no bill of exceptions.

In this aspect of the case, as there is no question presented on the record for revision, a judgment of affirmance is a matter of course.

Taylor *v.* Morton, 2 Black, 481.

Pomeroy *v.* Bank of Indiana, 1 Wall., 592.

II. Should this court however hold that the bill of exceptions is sufficient, and raises the questions sought to be raised, and that the evidence is properly in the transcript, then we submit that the rulings of the judge below were correct.

The five exceptions taken to the judge's charge raise in effect but a single question, that is, whether the agreement of Wilson to ship the entire cotton crop to Reed & Co. was a condition precedent to the payment of the $4,000 to Gard-

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plantation, together with the negroes on it, with covenant that he had a good title to the plantation, and was lawfully possessed of the negroes, and for quiet enjoyment: On being sued on an annuity given by B for said property, plea that A was not legally possessed of the negroes held ill; the court saying if such plea allowed, any negro not being the property of A would bar the action. So in this case, if Wilson had sent all the cotton, except one bale, if the plea put in by Reed & Co. sustained, then no action would lie against Reed & Co. by Gardner.

Where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that he should enjoy that part without paying or doing anything for it. Hence the law obliges him to perform the agreement on his part, and leaves him to his remedy for damages for not recovering the whole consideration. So in this case Reed & Co., having received the greater part of the cotton, are compelled to perform their agreement in favor of Gardner, and are left to sue Wilson for damages for not sending them the entire cotton crop.

(*c*) As regards the instructions prayed for and refused, they all, except the second, are variations of the idea that Wilson's shipping the entire crop to Reed & Co. was a condition precedent.

As this point was disposed of by the court in the instructions given and excepted to, it was unnecessary for the court to repeat them in a new form.

The court is not bound to repeat to the jury the same substantial propositions of law in a different form.

Kelly *v.* Morris, 6 Peters, 622.

It is not error to refuse to give instructions asked for, even if correct in point of law, provided those given cover the entire case, and submit it properly to the jury.

Laber *v.* Cooper, 7 Wall., 565.

Tome *v.* DuBois, 6 Wall., 548.

Mills *v.* Smith, 8 Wall., 27.

This disposes of all the exceptions for refusing to instruct except the second. The instruction prayed for was, that Gardner had no lien as landlord, good as against factor lien, until he had levied his distress warrant.

The statute law of Georgia gives the first lien to the landlord in preference to all other claimants "on the crop raised on the premises."

Code of Georgia, sec. 2260.

Gardner, therefore, as landlord, by the statute law, had a prior lien to Reed & Co., as factor, on the crop. This priority of lien is admitted in the instruction prayed for, but it is suggested that it was lost because Gardner did not levy his distress warrant.

But it was unnecessary for Gardner to levy his distress warrant, as Reed & Co. had expressly agreed to admit the priority of Gardner's lien in distributing the proceeds of the cotton.

It is a familiar rule of law, that a lien may be waived.

As either a general or particular lien may be created, so it may be controlled by special contract between the parties. "*Conventio vincit legem*" is a maxim as old as the law, and persons are entitled, if they please, to introduce into their contract any article to prevent the general application of a general rule of law.

Cross on Law of Lien, (Law Library,) sec. 40, p. 43.

The general rule of law, that a factor has a lien on the goods of the principal for his general balance, is not disputed: but here the goods were deposited in the hands of particular factors, for a particular purpose, which is stated by the factors themselves in their receipt; and this negatives the general rule respecting liens.

Per Ashurst, J., in Walker *v.* Burch, 6 Term R., (Durnford & East,) p. 262.

So, if Reed & Co. had had a prior lien, they might have waived it by special agreement, as "*Conventio vincit legem.*"

Much more, therefore, could they dispense, by agreement, with the formality of Gardner's issuing a distress warrant, by agreeing, as they did, to pay his rent out of the proceeds of the cotton.

The agreement of Reed & Co. to pay the rent to Gardner out of the proceeds of the cotton constitutes an estoppel *in pais*, which excludes them from complaining that Gardner did not levy his distress warrant on the cotton.

Where a person encourages an act to be done, he cannot afterwards exercise his legal rights in opposition to such consent.

Swain *v.* Seamens, 9 Wall., 254.

See further on this point—

Griffin *v.* Clinton R. R. Co., 1 Western Law Monthly, 31.

The Freeman *v.* Buckingham, 18 How., 182.

The court was clearly right, then, in refusing this instruction.

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